

BLUMENFELD & COHEN
SUITE 300
1625 MASSACHUSETTS AVENUE, NW
WASHINGTON, DC 20036

202.955.6300
FACSIMILE 202.955.6460

<http://www.technologylaw.com>

ORIGINAL

EX PARTE OR LATE FILED

SUITE 1170
4 EMBARCADERO CENTER
SAN FRANCISCO, CA 94111
415.394.7500
FACSIMILE 415.394.7505

September 8, 1999

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, SW, TW-A325
Washington, DC 20554

SEP 08 1999

Re: CC Docket No. 96-98

Dear Ms. Salas:

We are writing on behalf of Rhythms NetConnections Inc. ("Rhythms") to follow up our recent meetings with the Commission staff on issues related to the Commission's pending order in the above-captioned rulemaking.¹

Rhythms is a nationwide provider of high-performance, high-speed data services, primarily using digital subscriber line ("DSL") technology for high-speed local access to and from end users' desktops. We provide highly reliable data networking solutions at a reasonable cost to residential and business throughout the country. Rhythms does not focus solely on the Internet service provider market, but instead provides broad market coverage—including suburban areas as well as metro areas—offering a full range of services. Our services are used for: (1) the networking of remote locations for, among other things, telecommuting or work-at-home applications; (2) dedicated access to the Internet; and (3) dedicated "always-on," access to intranet-type networking solutions. Rhythms is deployed nationwide. Rhythms' deployment in a metropolitan service area ("MSA") does not focus solely on the core urban downtown areas that have been the primary focus of voice competition. Rather, when Rhythms deploys in an MSA, the focus is on a ring of suburban and residential neighborhoods outside the city. As a result, many of the issues raised in this proceeding and the availability of unbundled network elements ("UNEs") are heightened by this deployment approach.

In order to provide DSL service, Rhythms requires three primary components from the incumbent local exchange carrier ("ILEC"). First, Rhythms must lease "clean" copper loops that

¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Second Further Notice of Proposed Rulemaking, CC-Docket No. 96-98, FCC 99-70 (rel. April 16, 1999).

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are unfettered by interfering loop equipment such as load coils, repeaters and excessive bridged taps. *Second*, Rhythms needs to be able to collocate and maintain equipment at the central office end of the loop. *Third*, Rhythms requires timely provision of unbundled transport facilities from the ILEC because competitive interoffice transport alternatives are unavailable.

Accordingly, unless Rhythms is denied reasonable access to loops and collocation, unbundled DSLAMs are not "necessary to the competitive provision of DSL services. Rhythms' experience in obtaining each of these necessary components emphasizes the need for this Commission to ensure that they are provided by the incumbents on unbundled basis.

Access to clean copper loops. Rhythms' services compete directly with the DSL services provided by the ILECs. However, the performance of our service offerings far exceed the functionality of the more limited offerings of the ILECs. ILECs have chosen to provide only ADSL services on a retail basis.² The "damped-down" ILEC DSL offerings are limited to customers served only over short loops. They are also restricted to customers who are willing to obtain their voice services from the ILEC. These decisions to limit their service offerings could have numerous strategic bases, including the desire to instill in the public the sense that DSL is not a serious service, in order to protect existing customer base of corporate T-1 users. ILECs reinforce this unavailability by setting charges for removal of interfering devices (so-called "conditioning" charges) at exorbitant rates that bear no rational relationship to TELRIC costs. By making loop preparation rates so high, ILECs discourage data CLECs such as Rhythms from serving the customers the ILEC has strategically chosen to ignore because the CLEC has no hope of recovering such charges over the course of the customer relationship. In the early 1990s, pricing for loop condition for ISDN services in California dealt with similar loop preparation issues. Ultimately, these charges were reduced to more forward-looking levels.

As a part of making loops available as an unbundled network element priced at TELRIC, it is critical that the Commission address the issue of conditioning costs for DSL-capable loops. The high conditioning charges imposed on competitors by the incumbents are a prime example of the type of cost that contradicts the fundamental principles and purpose behind the TELRIC pricing methodology, which seeks to mirror the prices that would prevail in a truly competitive market. In a competitive environment, the networks would contemplate a DSL-ready market and the network would have been upgraded to accommodate that demand. This is particularly true since the incumbent LECs have been aware of the benefits and promise of DSL for nearly two decades and should have been conditioning their loops to offer a service that clearly would have brought appreciable benefits to their customers. In reality, however, the ILECs were incented to ensure that DSL technologies remained unavailable so that there would be no arbitrage of their existing, much higher priced, data offerings such as T-1s.

Under accepted Bellcore (Telcordia) Resistance Design Guidelines, on loop under 18,000 feet (18 kft) in length, incumbents should not have load coils and should have only limited bridged taps. This principle is recognized by many ILECs, including Bell Atlantic. Thus, imposing conditioning charges on competitors for loops under 18,000 feet penalizes competitors for the ILECs' failure to follow their own network design rules. Similarly, the ILECs have been conditioning loops in their networks to offer 56 Kbps ISDN and frame relay services. Thus, the

² The ILEC also provision DSL services using HDSL technology.

need to condition loops to offer consumers newer and better services is neither a novel nor unanticipated concept, nor is it an unpracticed one for the incumbents. Accordingly, the TELRIC model presumption of an efficient network demands that the incumbents provide DSL-capable loops, rather than imposing “conditioning” costs on competitors.

Significantly, the incumbents certainly do not factor conditioning charges into their own DSL prices nor do they impose those charges on their own DSL customers.³ This suggests that either the incumbents have determined to offer their services at a price at which competitors cannot match by charging competitors unreasonably high charges to clean up the loops without incorporating such costs into their own offering, or that their provisioning of loops for DSL occurs in such a manner whereby the loops that they utilize for their services, unlike competitors, somehow never contain load coils and bridge taps. The fact is that incumbents’ DSL services, no less than competitors’, require a clean, unfettered loop.

The ILECs have also made a strategic decision not to offer any DSL services, such as SDSL and HDSL, that would require the removal of load coils and bridge taps on “long” loops. By tailoring their own offerings in such a limited fashion, the ILECs’ seek to exempt themselves from the need to obtain clean loops that exceed 18,000 feet in length. In turn, the exorbitant “conditioning” charges imposed on competitors are never imposed for their own services offerings nor imputed into their service rates. By misinterpreting the nondiscrimination requirements of the Act and this Commission to mean that ILECs must only provide their competitors with exactly the network elements they use themselves, this approach enables ILECs to undercut the Commission’s competitive goals. It also allows them to gate competition—through imposition of excessive charges for offerings they have elected not to provide—in direct contravention of the Commission’s March 1999 decision that ILECs cannot unilaterally dictate the types of DSL technology that can be deployed by competitors. This strategy becomes even more suspect given the significant benefit of these other types of DSL services to consumers, particularly to those consumers whose only other alternative would be a more expensive ISDN or T-1 line.

Accordingly, in the UNE Remand proceeding, the Commission should expressly hold that ILECs’ obligation to provide unbundled loops to competitors includes making loops DSL-capable at TELRIC prices, and that since such a TELRIC price reflects an efficient network, the price of a DSL-capable loop, regardless of length, would not include conditioning charges.

Collocation in reasonable intervals. In order to access the loop, Rhythms must be able to place its equipment on the ILEC premises at the point in the network where the copper terminates. Perhaps the single greatest obstacle to initial roll-out has been our ability to obtain

³ The incumbent LECs do not even include loop costs in their prices, much less the costs of conditioning those loops. At issue in the following proceedings were the attempts by several incumbent LECs to tariff their DSL services assuming zero loop costs. See *BellSouth Telecommunications, Inc. BellSouth Tariff FCC No. 1, BellSouth Transmittal No. 476*, Direct Case of BellSouth, CC Docket No. 98-161 (filed Sept. 11, 1998); *GTE Telephone Operating Companies GTOC Tariff FCC No. 1 GTOC Transmittal No. 1148*, Direct Case of GTE, CC Docket No. 98-79 (filed Sept. 8, 1998); *SBC Communications, Inc. for Pacific Bell Telephone Company Pacific Bell Tariff No. 128, Pacific Transmittal No. 1986*, Direct Case of Pacific Bell, CC Docket No. 98-103 (filed Sept. 11, 1998); *Bell Atlantic Telephone Companies, Tariff No. 1 Transmittal No. 1076*, CC Docket No. 98-168, Bell Atlantic Direct Case (filed Oct. 6, 1998).

collocation within reasonable timeframes. Without a federal mandate regarding collocation provisioning intervals, Rhythms doubts the Commission will see much improvement in the timeframe for obtaining collocation. In Rhythms' experience, unbundled collocation is typically taking five to seven months to obtain from the ILECs. As a result, if a customer seeks service from Rhythms from a central office that Rhythms has not already obtained collocation in, Rhythms will be unable to provide them service for well over one-half year, simply because of the timeframe for obtaining collocation. The Commission declined to mandate aggressive provisioning intervals and state commissions have been reluctant to address these intervals. As a result, even in those jurisdictions where cageless collocation has been offered, the incumbents still insist on provisioning the collocation in the same protracted timeframe associated with their much more labor intensive traditional, caged, segregated physical collocation offering.

Availability of unbundled transport. ILEC unbundled transport frequently remains the only viable source of transport for competitors. For Rhythms, in a significant portion of its deployment area, the incumbents' network is the only realistic source of transport. Because Rhythms provides its "downtown" high-speed services to suburban and ex-urban areas where there is frequently little or no competitive transport and where even competitive transport providers rely on the incumbent's network, it is critical that Rhythms have the ability to purchase transport from ILECs at rates that comport with TELRIC. Special Access transport is an unrealistic substitute because it does not ensure a reasonable price, particularly in view of the Commission's most recent determinations on pricing flexibility for competitive transport.

As the Commission has previously noted, "DSL services are often marketed as broad-based offerings to small business and residential customers, thus requiring competitors to collocate in many, if not all, of the wire centers in an MSA, *many of which may lack transport facilities.*"⁴ Rhythms' experience is consistent with this finding. Frequently, there is little if any competitive transport available in our service areas, since Rhythms focuses on providing "downtown" high-speed capabilities to suburban and ex-urban areas. Thus, it is critical that the Commission provide competitors such as Rhythms with the ability to obtain unbundled aspect to transport, as the incumbents' transport facilities are often the only facilities that Rhythms could utilize to serve customers in many of the areas in which Rhythms is deployed.

Based on Rhythms' experience in obtaining transport, the Commission should be aware that even in urban areas, there is a significant shortage of capacity in many MSAs, including the District of Columbia. Even on those routes where there is *some* competition, demand is far outstripping the supply. Quite frequently, either transport capacity is available from everyone, including ILECs and competitive transport providers, or from none.

Even in instances where Rhythms is purchasing transport from a non-incumbent, third-party provider, in many instances the third-party provider does not have sufficient transport capacity in its own network to supply competitors with an alternative to the incumbent. Moreover, of the total capacity made available by alternative providers, a significant percentage is not even the providers' own transport facilities, but rather the facilities of the regional incumbent that the provider must rely on because its own networks lack sufficient capacity.

⁴ *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order (rel. Aug. 27, 1999) ("Access Charge Reform") ¶ 82.

When the incumbent denies or delays transport to the third-party provider, that provider must in turn deny transport to Rhythms. For example, just such a scenario has impacted Rhythms operations in Raleigh, North Carolina. Earlier this year, Rhythms ordered 24 DS-3s from a third-party provider. After receiving a "Firm Order Confirmation" and a delivery time-frame of May, the provider was unable to deliver transport in a timely manner because the ILEC placed the transport orders on hold at a lesser priority status on the grounds that it did not have sufficient capacity. Even though Rhythms has eventually received some DS3s from this order, most, if not all, of the deliveries have been late.

Unbundled DSLAMs were competitive inputs are not provided. DSLAMs and packet-switching technologies are widely available, at commercial quantities in a competitive wholesale market, and thus need not be unbundled as a network element. Unfortunately, there are times when ILECs cannot or do not provide access to copper loops or necessary collocation. In such circumstances, competitors are unable place their own DSLAMs in the incumbents facilities. Then and only then, competitors should have access to unbundled DSLAMs.

Competitors' ability to provision their own DSLAMs and packet-switching technology is only as useful as competitors' ability to place this equipment at the customer's copper loop end. Without this ability to access the loop, owning a DSLAM is meaningless. Thus, unbundled access in these limited instances is necessary to ensure that consumers are able to benefit from competitors that have emerged as leaders in the advanced services market and have been providing the widest range of services. Such a limited unbundled requirement would also provide the incumbents with a powerful incentive to ensure that all other possible options for competitors to access unbundled loops have been exhausted.

It is not disputed that in some instances, competitors are technically unable to place their equipment at the end of a customer's copper loop via collocation in remote terminals, central offices, DLC vaults or other incumbent facilities. Sometimes, ILECs refuse to allow collocation, claiming lack of space or a different reading as to their obligations to allow competitors unencumbered access to customer's loops. In these limited situations, Rhythms believes it is necessary to require the incumbents to allow competitors to access incumbent DSLAMs and packet-switching technology. In the face of the inability to place their own equipment at the end of customers' loops, the only way in which Rhythms and other competitors can offer customers an alternatives to incumbents service, is to access the incumbents DSLAMs and packet-switching technology.

An additional benefit of requiring access in these limited circumstances is that it poses a market incentive⁵ for the incumbents to comply with the Commission's *Advanced Services*

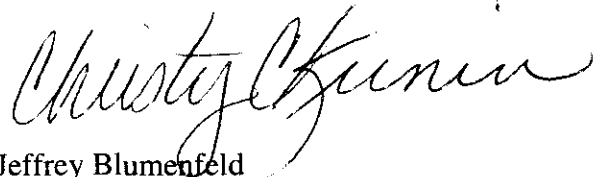
⁵ It appears as though the incumbents have not viewed regulatory obligation as a sufficient incentive to comply with the Commission's determinations. To date, competitors, including DSL providers like Rhythms, have faced significant difficulty in getting collocation under the terms and provisions mandated by the FCC. For instance, Bell Atlantic has attempted to skirt the order by filing state collocation tariffs that are blatantly inconsistent with the FCC's collocation rules, and so far, has indicated no intention of filing federal collocation tariffs that contain terms consistent with the decision. Rhythms, through its subsidiary ACI, challenged such a Bell Atlantic state tariff in Maryland in a comment filing, which is attached. ACI Comments on Bell Atlantic-Maryland, Inc., Access Service Tariff, MD P.S.C. No. 218, Transmittal No. 1091, Case No. 8766, (filed June 4, 1999).

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*Order*⁶ mandating that they allow competitors to collocate in existing space in incumbent facilities and the Commission's *Advanced Services MO&O*⁷ requiring incumbents to provide competitors with DSL-capable loops "even through remote concentration devices such as digital loop carriers (DLC)."⁸ By proactively ordering that ILECs that cannot provide collocation or loops for the provision of DSL services must provide competitors with unbundled DSLAMs and resale so that competitors can serve every requesting end user, the Commission will force the ILECs to examine their refusals more closely.

In sum, Rhythms urges the Commission to determine that competitors have a right of access to unbundled transport at TELRIC rates, unbundled clean copper loops of any length at TELRIC-based rates, and, where denied access to the end-users' copper loop, unbundled DSLAMs and packet-switching technology.

Sincerely,



Jeffrey Blumenfeld
Christy C. Kunin
Lisa N. Anderson

For Rhythms NetConnections Inc.

cc: Lawrence M. Strickling, Chief, CCB
Jake Jennings, CCB
Christopher Libertelli, CCB
Stagg Newman, OET
Jon Reel, CCB
Jerry Stanshine, OET
Doug Sicker, OET

Dorothy Attwood, Chairman Kennard
William Bailey, Cmr. Furchgott-Roth
Linda Kinney, Cmr. Ness
Kyle Dixon, Cmr. Powell
Sarah Whitesell, Cmr. Tristani

⁶ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order, (rel. Mar. 31, 1999).

⁷ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order (rel. Aug. 7, 1998) ("Advanced Services MO&O").

⁸ Advanced Services MO&O ¶ 54. In full, the Commission stated that the "incumbent's obligation to provide requesting carriers with fully functional conditioned loops extends to loops provisioned through remote concentration devices such as digital loop carriers (DLC)," and reiterated its conclusion in its *Local Competition Order* that "it was 'technically feasible' to unbundle loops that pass through an integrated DLC or similar remote concentration devices, and required incumbent LECs to unbundle such loops for competitive LECs." *Advanced Services MO&O* ¶ 54 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket 96-98, 11 FCC Rcd. 15499 (1996)).